IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 814 OF 2004.

1. Shri Harish Keshav Menon,
Adult, Indian Inhabitant,
residing at Flat No.202,
Narmada Dham, Navghar Road,
Bhayandar (East), Thane.

2. Mrs.Santan John Rodriques,
Adult, Indian Inhabitant,
residing at Anandran
Agashe Cross Naka, Virar,
Taluka Vasai,Dist. Thane.

Through their Constituted
Power of Attorney Mr.John
Michael Rodriques, resident
of Office No.2, Shanti Gandha
Apartment, B Bldg., Bhayandar
(East), Dist. Thane. .... Appellants.

Versus.

1. Shri Mukesh Chhabildas Parekh,
Proprietor of M/s.Naivedhyam
Builders, Aged: 46 years,
Occ.: Business, carrying on
his business at G-9, Walchand
Complex, 90 Road, Bhayandar
(East), Diost. Thane.

2. Shri Nandkumar D.Kargutkar,
aged 36 years, Occ.: Business,
carrying on business at Shop
No.2, Ground floor, Narmada
Dham, Navghar Road, Bhayandar
(East), Dist. Thane. .... Respondents.

Shri K.S.Dewal for the Appellants.

Shri R.D.Suryawanshi for the Respondents.

CORAM : ABHAY S. OKA, J.

DATED : 4th March, 2005.

ORAL JUDGMENT.

1. This Appeal was heard finally on 1st March 2005 and the learned Counsel appearing for the parties have been fully heard. Today also I have heard further submissions made by the learned Counsel appearing for the parties.

2. The Appeal from order is preferred by the original Defendants for challenging the Judgment and Order dated 24th June 2004 passed by the learned trial Judge on Applications at Exh.5 and Exh.36. The Application at Exh.5 is made by the original Respondents/Plaintiffs and the Application at Exh.36 is filed by the Appellants/Defendants.

3. The Respondents filed Special Civil Suit No.547 of 2003 against the Appellants for declaration that the Appellants have no right, title and interest in respect of the suit premises, viz. shop No.2 admeasuring 31.05 sq.meters more particularly described therein. A further declaration was prayed that the agreement dated 12th February 2003 executed by the Respondent No.1 in favour of the Appellants was illegal and void ab-initio

for want of consideration and the same may be set aside. A prayer for perpetual injunction was made restraining the Appellants from taking forcible possession of the suit shop.

4. The case of the Respondents is that the Respondent No.1 is a developers of the immoveable property situated village Khari, Bhayandar, Taluka and District Thane. The case of the Respondents is that on representation made by the Appellants that they were in possession of a shop premises in old building existing on the property under development, the Respondent No.1 executed an agreement for sale in favour of the Appellants in respect of the suit shop on 12th February 2003. The case of the Respondents is that though no consideration was paid, on representation made by the Appellants that consideration would be paid by them, receipts were issued by the Respondent No.1 for payment of a sum of Rs.3 lakhs which was the agreed consideration for the suit shop. It is alleged that the suit shop was agreed to be sold to the Appellants at a concessional rate. It is an admitted position that the said agreement was registered. It is specifically stated by the Respondents in the plaint that though the receipt clause of the agreement shows that a cheque in the sum of Rs.70,000/- was received by the Respondent No.1 along

with cash of Rs.2,30,000/-, in fact the said amounts were never received.

5. The further case of the Respondents is that the Respondent No.1 realised that false representation was made by the Appellants that they were holding a shop in the old building and on that basis the agreement was executed by the Respondent No.1. A notice dated 27th October 2003 was issued by the Respondent No.1 for cancellation/termination of the said agreement. it is the case of the Respondents that the Respondent No.1 never delivered possession of the suit shop to the Appellants. It is their case that no reply was sent by the Appellants to the notice.

6. The case of the Respondents was that there were two separate agreements executed by the Respondent No.1 in favour of the members of the family of the Appellant No.1. By the said agreement different premises were agreed to be sold in favour of the members of the family of the Appellant No.1. The said agreements were also executed without accepting any consideration. The Respondent No.1 filed suits restraining the father and mother of the Appellant No.1 from taking forcible possession of flats subject matter of the said agreements. In the said suits there was a compromise

under which amounts were agreed to be paid by the father and mother of the original Defendant No.1 and consent terms were filed. The case of the Respondents is that on 30th October 2003 a registered agreement for sale was executed by the Respondent No.1 in favour of the Respondent No.2 by which the suit shop was agreed to be sold to the Respondent No.2. On the same day entire consideration was paid by the Respondent No.2 to the Respondent No.1 and the Respondent No.1 has put the Respondent No.2 in physical possession of the suit flat.

7. Along with the suit an application for temporary injunction was made. In the said application for temporary injunction, the learned trial Judge issued show-cause notice to the Appellants which was made returnable on 1st January 2004. However, no ad-interim relief was granted. On the returnable date, the Appellants filed purshis stating therein that on 20th October 2003 they were put in possession of the suit shop by the Respondent No.1 on the basis of the agreement dated 12th February 2003 and a possession letter has been issued. It is stated in the said purshis that both the Appellants were served with the notice on 31st December 2003 though notice was ordered to be issued on 18th December 2003.

8. It is the case of the Appellants that on 3rd January 2004 the Respondents dispossessed them and took forcible possession of the suit shop. On 8th January 2004 a detailed written statement was filed by the Appellants. In the said Written Statement the Appellants asserted that they were holding shop premises in the old building and there was no misrepresentation made. They asserted that the entire consideration was paid by them and on the basis of the agreement dated 12th February 2003, on 20th October 2003, they were put in possession of the said shop and possession receipt signed by the Respondent No.1 was also issued. After filing of the Written Statement an application at Exh.36 was made by the Respondents for restoration of the possession of the Appellants.

9. The learned trial Judge allowed Application at Exh.5 and granted injunction against the Appellants restraining them from dispossessing the Respondents from the shop premises. The learned trial Judge recorded a prima-facie finding in favour of the Appellants that as per the said agreement dated 12th February 2003 the entire consideration was paid by the Appellants to the Respondent No.1. The learned trial Judge also prima-facie accepted the case of the Appellants that they were holding a Shop on the ground floor in the old

building. The learned trial Judge, however, held that though letter of possession was issued by the Respondent No.1 in favour of the Appellants, the Appellants were not in physical possession of the said shop and the possession obtained by the Appellants was only on paper. The learned trial Judge held that on the date of institution of the suit the Appellants were not in possession. The learned trial Judge however recorded a finding that on the date of the institution of the suit the Respondents/Plaintiffs have failed to prove their title to the suit shop. The learned trial Judge observed as the Appellants were claiming that they were in possession of the suit shop a possibility that they may dispossess the Respondents without due to process of law cannot be ruled out. Therefore, the learned trial Judge allowed Application at Exh.5 and rejected the Application at Exh.36.

10. Shri Dewal, the learned Counsel appearing for the Appellants submitted that after recording a categorical finding that the Respondents had no title to the suit shop on the date of institution of the suit, the learned trial Judge could not have granted injunction in favour of the Respondents. He submitted that even while sending reply to the notice dated 27th October 2003, the Appellants asserted that they were put in possession of

the suit shop. He pointed out that the Respondent No.2 has not filed any affidavit stating that he was put in possession of the suit shop. He submitted that no prima-facie evidence has been produced to show that any consideration was received by the Respondent No.1 from the Respondent No.2. He pointed out that the learned trial Judge has accepted the entire case made out by the Appellants save and except that the Appellants were put in possession on the basis of the letter of possession dated 20th October 2003. He submitted that in the absence of any evidence on record to show that the Respondent No.2 was a bonafide purchaser who was put in possession, the learned trial Judge ought to have allowed the Application at Exh.36 and restored possession in favour of the Appellants. He submitted that the Appellants had also filed a detailed pursis on returnable date asserting that they were put in possession. He submitted that there is no equity in favour of the Respondents and therefore, in any event the Application at Exh.5 should not have been allowed. He has taken me through various documents a reference to which will be made at later stage.

11. Shri Suryavanshi the learned Counsel appearing for the Respondents has submitted that a detailed affidavit in rejoinder was filed by the Respondent No.1 at Exh.32

in which it is asserted that the father of the Appellant No.1 was in possession of blank possession letters signed by the Respondent No.1. He submitted that the the affidavit-in-rejoinder filed by the Respondents has not been considered by the learned trial Judge. He further submitted that no prima-facie evidence has been produced by the Appellants regarding payment of consideration of Rs.3 lakhs. He submitted that there is no evidence to show that a cheque for the sum of Rs.70,000/- was handed over to the Respondent No.1 and the same has been encashed. He submitted that the trial Court has found that the Appellants were not put in possession of the suit shop. He submitted that the Appellants have not filed any counterclaim and without filing any counterclaim they are not entitled to seek any mandatory injunction. Relying upon the judgment of the Apex Court reported in 1990 (Supp.) S.C.C. page 727 (Wander Ltd. & anr. v/s. Antox India P.Ltd.) he submitted that the power of the Appellate Court to interfere against an Order passed under Order 39 Rule 1 of the Code of Civil Procedure, 1908 in an Appeal from Order under Order 43 Rule 1(r) of the said Code is very limited as the relief of temporary injunction is a discretionary relief. He submitted that unless exercise of discretion is shown to be arbitrary or perverse no interference is called for. He also invited my

attention to the fact that after the impugned order was passed, the Appellants have filed a substantive suit for specific performance of the agreement dated 12th February 2003. It is contended in the said suit that though an area of 393 sq.ft. was agreed to be provided, the suit shop was lesser in area. He submitted that in view of the substantive suit filed by the Appellants, no relief can be granted in favour of the Appellants in the present suit. lastly it is stated that as the affidavit-in-rejoinder has not been considered by the learned trial Judge, even if the Appellants have made out any case on merits, the impugned order may be set aside and both the Applications be remanded.

12. I have considered the rival submissions. The suit agreement dated 12th February 2003 relied upon by the Appellants is admittedly registered. An endorsement on the first page of the said agreement shows that the stamp duty of Rs.57,500/- has been paid by the Appellants. It is also the case of the Appellants that the entire consideration of Rs.3,00,000/- has been paid by them. The receipt clause of the said Agreement shows that a sum of Rs.70,000/- has been paid by cheque dated 11th February 2005 and it also discloses cash of Rs.2,30,000/- was paid to the Respondent No.1. There is a separate receipt executed on 21st February 2003 for

payment of Rs.70,000/- by the Respondent No.1. The signature on the receipt dated 21st February 2003 is not disputed by the Respondent No.1. The Respondent No.1 has not disputed his signature on letter of possession dated 20th October 2003 issued in favour of the Appellants in respect of the suit shop. From the documents produced on record it appears that a notice was sent by the Advocate for the Appellants on 29th October 2003 to the Respondent No.1. The postal envelope of the said notice appears to have been returned with the remark "unclaimed". In the said notice it is asserted that the Appellants have been put in possession.

13. The Respondents have placed reliance on the notice of termination dated 27th October 2003. In the Written Statement a specific case was made out by the Appellants that the notice was served on them on 31st October 2003. This assertion is made in paragraph 11 of the written statement. In the affidavit-in-rejoinder at Exh.32 filed by the Respondent No.1, he has dealt with the averments made in paragraph 11 of the written statement in paragraph 24. I find that the case made out by the Appellants that the notice was served on 31st October 2003 on the Appellants is not denied by the Respondent No.1. It is the case of the Respondents that the

agreement for sale was executed in favour of the Respondent No.2 on 30th October 2003. It is thus obvious that even before the so called notice of termination was served on the Appellants, the Respondent No.1 has executed the agreement for sale in favour of the Respondent No.2 in respect of the suit shop. In so far as the agreement executed in favour of the Respondent No.2 is concerned, the case is that on the same day the Respondent No.2 paid the consideration of Rs.6.05,000/- to the Respondent No.1 and the Respondent No.2 was put in possession. It is surprising to note that the Respondent No.2 had not filed any affidavit in support of his case that he was put in possession on 30th October 2003. When very serious allegations were made by the Appellants in the written statement and the Application at Exh.36, it is surprising to note that a person who is stated to have invested a sum of Rs.6,00,000/- has not come out with an affidavit asserting that he is the owner of the suit shop and has been put in possession thereof on 30th October 2003. The Appellants have asserted that they have paid a sum of Rs.3 lakhs to the Respondent No.1, but there is no statement on oath by the Respondent No.2 that he paid consideration to the Respondent No.1. There is one more important aspect of the matter which needs consideration. Since the suit is filed jointly by the

Respondents Nos.1 and 2 obviously it cannot be the case of the Respondent No.2 that he is a bonafide purchaser without knowledge of the transaction between the Appellants and the Respondent No.1. In fact it is not at all the case of the Respondent No.2 that he is a bonafide purchaser. In the absence of any affidavit forthcoming from the Respondent No.2, it is difficult to accept the case of the Respondent No.1 that on 30th October 2002 the Respondent No.2 was put in possession. In any event, the Agreement in favour of the Respondent No.2 was purportedly executed before service of notice of termination issued by the Respondent No.1 of the earlier agreement on the Appellants.

14. On 3rd January 2004 the Appellants filed a complaint with the local Police Station and a First Information Report was registered. In the said F.I.R. there is a reference to the suit agreement dated 12th February 2003 and it is stated that the Appellants were put in possession of the suit shop. Though the Respondents may not have received notice dated 29th October 2003 which was sent by registered post A.D. as the same was returned unclaimed, the notice sent under certificate of posting was not returned. There is an assertion in the said notice that the Appellants were placed in possession of the suit shop. Admittedly till

31st October 2003 notice of termination dated 27th October 2003 was not served on the Appellants. Even in the reply to the notice of termination, the Appellants have asserted that they were put in possession on 20th October 2003. On the returnable date of notice of Application at Exhibit 5, a pursis was filed by the Appellants asserting that they were in possession of the suit shop and specifically referring to the letter of possession dated 20th October 2003. Inspite of this position, the Respondent No.2 did not file any affidavit asserting his claim that he was put in possession of the suit premises on 30th October 2003. What is curious to note is that at no stage the Respondent No.2 has made any attempt to state on oath before the Court that he was put in possession. Such conduct on the part of a person who has allegedly parted with a sum of more than Rs.6,00,000/- is surprising.

15. So far as the case made out by the Respondents that the Appellants were not holding any shop premises in the old building is concerned, the finding recorded by the learned trial Judge is in favour of the Appellants. There are documents produced on record by the Appellants of the year 2000-2001 in form of electricity bills, in support of their contention. It is surprising that 8 months after execution of the suit agreement suddenly

the Respondent No.1 stated that the agreement has been got executed by misrepresentation and the Respondent No.1 issued notice on 27th October 2003 and thereafter purportedly sold the suit shop to the Respondent No.2 even without waiting for the notice to be served on the Appellants.

16. It is true that there is no specific reference to the affidavit-in-rejoinder filed by the Respondents No.1 in the impugned Judgment. The contention that blank letter of possession has been utilised by the Appellant has not been dealt with by the learned trial Judge while passing the impugned order. The reason for non-consideration of the said Argument appears to be that a totally different stand was taken by the Respondents at the time of arguments. In paragraph 15 of the Judgment, the learned trial Judge held that:

> "During the course of argument the learned Advocate D.G.Naik for the plaintiff submits that signature appearing below Exh.25/3 is not that of plaintiff No.1. It is a manipulated receipt and therefore, cannot be relied on. In this context, Shri Naik advocate drawn my attention to the agreements those have been

executed in favour of father and mother of defendant No.1 inter alia contending that the parents of defendant No.1 forced him to sell the flat No.202 and 206 in the new Narmada Dham building. The agreements accordingly executed in their favour. They also did not pay any consideration. Therefore, he filed R.C.S.No.771/2003 and 489/2003 against them for declaration and perpetual injunction. Compromise arrived in respect of these suits and matters were settled amicably. It is further contention of Advocate Shri D.G.Naik that one of the receipts as it appears in those agreements has taken out by the defendants and placed in the record of suit agreement. The possession letter therefore cannot be construed to be legal."

It is very clear that all along the Appellants have been asserting that they are put in possession. As against this there is no affidavit filed by the Respondent No.2 who claims to be in possession from 30th October 2003. It is to be seen here that so far as the case relating to the non payment of consideration is concerned, there is a primafacie finding recorded by the trial Court that the contention raised by the Respondents regarding non

receipt of consideration is not acceptable. The learned trial Judge has also accepted the fact that the Appellants were holding a tenement in the old building. Considering all these aspects and the fact that in the Affidavit-in-Rejoinder, the Respondent No.1 has admitted his signature on the letter of possession, it is impossible to come to the conclusion that the Appellants were not put in possession of the suit shop. The learned trial Judge has held that possession of the suit shop was not delivered to the Appellants. It is obvious that the said finding recorded by the learned trial Judge is perverse. There is one more interesting aspect. The learned trial Judge has recorded a specific finding that the Respondents had no title to the suit shop on the date of filing of the suit. Even after recording the said finding, the learned trial Judge granted the relief of temporary injunction in favour of the Respondents. After recording such a finding and after accepting the case of the Appellants on all counts except one, he could not have granted equitable relief in favour of the Respondents by allowing application Exh.5. Going by the findings of the learned trial Judge, the prayer made in Application at Exh.5 should not have been granted. Therefore, the Application at Exh.5 deserves to be dismissed.

17. So far as the application at Exh.36 is concerned, the balance of convenience tilts in favour of the Appellants as it is not the case of the Respondent No.1 that from 30th October 2003 he continued to be in possession of the suit shop. His case is that he had handed over possession to the Respondent No.2. The Respondent No.2, as stated earlier, has not come forward and filed an affidavit to state that he has paid full consideration to the Respondent No.1 and he has been put in possession of the suit shop on 30th October 2003. On the other hand there is a registered agreement in favour of the Appellants executed in February 2003. All along the Appellants have asserted that they were put in possession on 20th October 2003 and regarding the payment of full consideration, the learned trial Judge recorded a prima-facie finding in favour of the Appellants. There is also a prima-facie evidence of dispossession in the form of police complaint filed on 3rd January 2004 by the Apellants. Two days prior to the filing of the Police complaint, on the returnable date, there was a pursis filed by the Appellants to show that they were in possession of the suit premises. The only primafacie conclusion which can be drawn is that on the date of filing of the suit the Respondents have failed to prove that they were in possession of the suit premises. The finding regarding their possession can

never be recorded in the absence of any affidavit filed by the Respondent No.2. Therefore, it follows that prima facie the Appellants were in possession on the date of institution of the suit. Therefore, the case of dispossession made out by the Appellants appears to be probable. Considering the fact that prima-facie title is established by the Appellants and the Respondents have failed to prove prima-facie case in support of their application at Exh.5, the application at Exh.36 will have to be allowed. In so far as the balance of convenience is concerned, a finding will have to be recorded in favour of the Appellants as the Respondent No.2 has not come forward to support the Respondent No.1. After execution of the agreement and after paying the entire consideration, if the possession of the Appellants is not restored, irreparable loss will be caused to them.

18. The Judgment of the Apex Court in the case of Wander Ltd. (supra) relied upon by the learned Counsel for the Respondents will have to be considered. It is to be noted that in the limited jurisdiction under Order XLIII Rule 1(r) of the said Code interference can be made where the discretion has been arbitrarily exercised by the trial Court. In my view this is a clear case of arbitrary exercise of discretion by the trial Court.

19. The suit filed by the Respondents is pending. There is also a suit for specific performance filed by the Appellants which is pending. Therefore, rights of both the parties will have to be protected. The protection can be best ensured by appointment of the Court Receiver and directing the Court Receiver to take possession of the disputed premises and put the Appellants in possession thereof as agents of the Court Receiver. The Appellats have a better title to the suit shop. At this stage Shri Suryavanshi, the learned Counsel appearing for the Respondents submitted that the Respondent No.2 may be appointed as Agent of the Court Receiver and he is willing to pay Rs.2000/- per month as royalty to the Receiver. Shri Dewal, the learned Counsel appearing for the Appellants stated that the Appellants are ready and willing to pay the royalty of Rs.3000/- per month. Considering the facts and circumstances of the case, the Appellants deserve to be appointed as Agents by fixing the royalty amount at Rs.3500/- per month. Hence I pass the following order:

O R D E R

(i) The impugned Judgment and Order dated 24th June 2004 is quashed and set aside. The Application at Exh.5 made by the Respondents is rejected. The Application at Exh.36 made by the Appellants is partly allowed.

(ii) The trial Court will appoint some fit and proper person as Court Receiver in respect of the suit shop. The Court Receiver will take possession of the suit shop and will put the Appellants in possession thereof as his agents subject to execution of usual agreement of agency.

(iii) From the date on which the Appellants are put in possession, they will be liable to pay royalty at Rs.3500/- per month. The royalty amount shall be deposited in advance i.e. on or before 10th of each and every month in the trial Court. The royalty amount shall be invested by the trial Court in any nationalised bank. The Receiver's charges shall be borne by the

Appellants.

(iv) In case the Appellants commit any default liberty to the Respondents to make an A[pplication for appointing them as Agents of the Receiver.

(v) The trial Court will hear and decide Special Civil Suit No.545 of 2003 and Suit No.516 of 2004 together. The said suits shall be decided as expeditiously as possible and preferably on or before 31st March 2006. The learned District Judge, Thane, will ensure that both the suits are transferred to one and same Court.

(vi) All contentions of the parties on merits of the suits are kept expressly open.

(vii) The Appeal from Order is disposed of in the above terms with no order as to costs.

(viii) The parties and the concerned Court to act on an authenticated copy of this order.

Judge.